



**DEFERRING MITIGATION MEASURE DETAILS
WHAT IS AND IS NOT ALLOWED BY CEQA?**

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The ability of a lead agency to put off defining mitigation measures for significant effects until after the CEQA process is complete has been an important bone of contention for many years. Lead agencies have said it is not possible to always provide certainty about the details of mitigation measures in the time frame of the MND or EIR process. On the other hand, the public has expressed concern that lead agencies avoid committing to environmental protection or cast too much doubt on whether mitigation will work, unless the measures are specifically described.

Certain court cases define the law about deferring the definition of mitigation details. The facts and important conclusions of these cases are summarized below.

ROBERT T. SUNDSTROM V. COUNTY OF MENDOCINO (1988)
88 Daily Appellate Record 8337

1. **Project.** The County of Mendocino's action was to approve a use permit for a private sewage treatment plant for a commercial recreation area, including a hotel and restaurant. The County adopted a Negative Declaration (ND) for the project. It involved a treatment plant with a capacity sufficient to serve the equivalent of 477 residents, with two enlarged sewage lagoons for winter storage of sewage, and summertime spray irrigation of treated wastewater on forest, brush and meadow areas. The total site was about 5 acres. The project is located in the coastal Town of Gualala, which lacks a community sewage system and experiences known, widespread problems of seepage from overloaded septic systems. The Coastal Commission and RWQCB had gone on record recognizing potential problems associated with the project related to ground and surface water hydrology.
2. **CEQA Documentation.** The CEQA documentation was an initial study and ND, not an EIR. The court found the Initial Study to be seriously flawed: consisting simply of a 41-item checklist with 38 impact questions checked "no" and 3 questions checked "code 2" ("No significant environmental problems will occur if mitigation measures are adopted.") It failed to explain any of the answers, provide sources or content of data supporting the answers, records of required consultations, description of mitigation inferred by the "code 2" notation, or describe the project and its environmental setting. Basically no analysis existed to support the checklist. No description of mitigation measures existed. In addition to the hydrology concerns, inadequacies

were cited by the court associated with lack of a sludge disposal site, keeping soils saturated in the summer, changes in vegetation, ecological effects, and scenic quality of the town. Yet the County was attempting to approve the use permit for the sewage treatment plant with an ND.

3. **Analysis.** The Board of Supervisors adopted two conditions with the use permit in an attempt to deal with public concern about hydrology issues:
 - a. "The applicant shall have a study prepared by a civil engineer with a hydrology background or a hydrologist which concludes that adjacent sewage disposal systems and surface and ground water hydrology will not be adversely affected by the proposed sewage facility."
 - b. "The applicant shall have a study prepared by a civil engineer which evaluates potential effects of the proposed development upon soil stability, erosion, sediment transport, and the flooding of downslope properties and contains recommended measures to minimize such impacts. ... Mitigation measures recommended by the study shall be incorporated as requirements of this use permit."

As is evident, the County was deferring the impact studies necessary to determine whether adverse effects would occur, and if so, what the mitigation might be. Also, the ND was woefully deficient in its lack of true impact analysis and description of mitigation measures.

4. **Court's Conclusions.** The court found that "deferring environmental assessment to a future date" and waiting to adopt mitigation measures until the measures have been recommended by a future study conflict with CEQA's process for adopting a negative declaration. In an ND the mitigation measures must be incorporated before public release of that document. The county erred when it refused to find that a significant effect to the environment may exist and refused to require an EIR.

One of the court's other relevant conclusion was that the County could rely on "compliance with environmental regulations" as a "reasonable mitigating measure." This approach is common and acceptable for compliance with air quality and water quality standards, where there is "meaningful information" reasonably justifying an expectation of compliance. In other words, reliance on an environmental permit is adequate if it is reasonable to expect that compliance will result in avoiding the significant impact.

SACRAMENTO OLD CITY ASSOCIATION V. CITY COUNCIL OF SACRAMENTO (1991) 91 Daily Appellate Record 5120

1. **Project.** The project consisted of expansion of the existing Sacramento Convention Center by 130,000 square feet of exhibition space and related facilities, in association with a new office tower. This is a downtown location where mixed, high

intensity urban uses are located including the existing convention center, other office buildings, hotels, and retail uses.

2. **CEQA Documentation.** The CEQA document was an EIR prepared to address in detail 5 design alternatives for the expanded convention center. The EIR was a comprehensive, full-scope document examining 14 environmental topic areas. The pertinent litigation issue was related to how parking impacts and mitigation measures were addressed in the EIR.
3. **Analysis.** The EIR found that under a worst-case scenario of full use of the expanded convention center and full occupation of the associated office towers, a significant impact on parking would occur. The worst-case shortfall of spaces was 2,621. The EIR identified this as a significant effect and discussed mitigation for it. The discussion of the impact included data and narrative explanations supporting the significant impact conclusion.

The discussion of mitigation included preparation of a Transportation Management Plan to reduce project-related traffic and parking impacts, which involved the adoption of an “overall program to reduce area parking to 90 percent occupancy” during critical weekday afternoon periods. Potential mitigations were listed and included satellite parking facilities and program controls to reduce parking demands (such as, restricting the size of short-term weekday events, promoting regional and national conventions which involve less auto travel for attendees, satellite parking areas without specific locations or facility plans identified, promoting alternative transportation modes, restricting local events to evenings and weekends, and construction of more onsite parking or offsite parking without identification of the specific locations or facility plans.)

4. **Different Situation Than in Sundstrom.** Plaintiffs argued that the EIR failed to describe “true” mitigation and failed to analyze significant effects of the mitigation measures. They contended that it only presented potential, general measures that might be included in an unformulated Transportation Management Plan, thus improperly deferring the specific mitigation decisions to some future date. The plaintiff used Sundstrom as its analogy.

The court said this was a different situation than Sundstrom. Sundstrom dealt with an ND, not an EIR. Mendocino County wrongfully determined that no significant impact occurred before required studies had been performed, while in Sacramento Old City, the EIR did not attempt to ignore a significant effect; the EIR identified parking as a serious problem. In Sundstrom, Mendocino County approved the project without considering any mitigation measures or having any description of mitigation measures, while in Sacramento Old City, a measure was adopted committing the City to formulate a plan and a listing possible components of it.

5. **Court's Conclusions.** The court found the EIR acceptable because “the City committed itself to mitigating the impacts of parking.” The court concluded that where formulation of the precise means of mitigating impacts is truly infeasible or

impractical, the approving agency should treat the impact as significant and commit to eventually working out such measures. Alternatively, where mitigation is known to be feasible, but where practical considerations prohibit devising the measure at the time of approval, there can be commitment to performance criteria for future actions to implement the project and its mitigation.

GENTRY V. CITY OF MURRIETTA (1995)
95 Daily Appellate Record 9513

1. **Project.** The project was a 198-home residential project called Adobe Springs II in Riverside County near Murrietta Hot Springs. This project was a subdivision map approval and zone change for a residential project that was consistent with the Southwest Area Community Plan, the overall land use plan for the area. An EIR on the Community Plan had been certified in 1989.
2. **CEQA Documentation.** The City adopted an ND with numerous mitigation measures among 129 conditions of approval and a mitigation monitoring program. The ND was “piggy-backed” off of the Community Plan EIR. Forty-three of the conditions were new, formulated and adopted after the public review of the ND.
3. **Analysis.** Gentry contended that some conditions improperly deferred the determination of appropriate mitigation measures into the future. The Court drew upon both Sundstrom and Sacramento Old City. All but one of the contentious mitigation measures were found to adequately meet the standards in Sacramento Old City, and therefore were compliant with CEQA, in that the significant impact was identified, mitigation commitment was made, and performance criteria were discussed. These included:
 - a. The applicant shall protect downstream properties from damage caused by alteration of the drainage patterns. Protection shall be provided by constructing adequate drainage facilities including enlarging existing facilities and/or by securing a drainage easement. The protection shall be as approved by the City Engineering Department.
 - b. The applicant shall submit an overall grading plan, which must be approved by the City Planning Director.
 - c. The applicant shall submit overall drainage improvement plans, grading plan, and final map, which must be approved by the County Flood Control and Water Conservation District. These plans and maps were subject to many performance criteria imposed by ordinances, codes, and City or County standards.
 - d. Future federal or state endangered species habitat conservation plans for the California gnatcatcher may be substituted for certain provisions of the project's gnatcatcher monitoring program, if the City finds that compliance with the plans provides equivalent mitigation.

One mitigation was found to violate CEQA. The City adopted a condition to obtain a biological study of the endangered Stephens' kangaroo rat. If the project was found by that study to adversely affect the species, the applicant was required to implement any recommendations from the report. The court felt this condition was comparable to the Sundstrom situation where the assessment of an impact was improperly deferred.

4. **Court's Conclusions.** In Gentry, the court reinforced the principles for proper deferral of mitigation measures established in the Sacramento Old City case. It also applied them to the adoption of an ND and provided several useful examples of acceptable mitigation deferral. The requirements of Sacramento Old City are summarized in the Gentry case as follows: "...the City recognized the significance of the potential environmental effects, committed itself to mitigating their impacts, and articulated specific performance criteria."

RIVERWATCH ET AL. V. COUNTY OF SAN DIEGO ET AL. (2000)
99 Daily Appellate Record 12,743

1. **Project.** The project involved the proposed development of a rock quarry on Rosemary's Mountain, next to State Route 76 (SR 76) in San Diego County. Because of the heavy truck traffic from the quarry, the project required widening of the two-lane SR 76, which is located adjacent to San Luis Rey River. Caltrans would be responsible for the widening of SR 76 as a separate project.
2. **CEQA Documentation.** San Diego County prepared an EIR for the proposed rock quarry, including the environmental effects of the required widening SR 76. Draft EIRs were released for public review in 1988, 1991, and 1996. The second and third Draft EIRs were prepared when the project was redesigned in response to public comments. Opponents commented heavily on the third Draft EIR, focusing in part on potential effects to the San Luis Rey River floodplain. The EIR found that the SR 76 widening would have a significant effect on the river's floodplain and offered mitigation in the form of bank protection features that would be defined in detail by a future HEC-2 model analysis.
3. **Analysis.** The mitigation issue was the degree of modeling and detail of description required for an adequate presentation of mitigation measures for impacts on the river. The EIR acknowledged the significant effect on the San Luis Rey River and quantified changes in flow velocity and surface elevation of the 100-year flood. Bank protection mitigation was described in concept, including general physical descriptions of location, height, depth, and materials used to construct the protected bank. Riverwatch objected to the deferral of HEC-2 modeling that was needed to define the details of the bank protection features, indicating this was an improper deferral of impact analysis and mitigation definition.

The court disagreed with Riverwatch and found the EIR to be adequate, because the EIR determined the impact to be significant with substantial evidence and described

what it could at the time regarding the nature of the mitigation. San Diego County responded to the Riverwatch criticism by indicating that more detailed HEC-2 modeling was not practical until Caltrans developed the design of SR 76. The EIR had evaluated the floodplain impacts to the extent it could given the conceptual definition of the SR 76 widening. The EIR also evaluated a potential alternative to avoid encroachment of the highway into the floodplain and found it to be infeasible. The County required the applicant to commit to implementing the bank stabilization and to conduct the HEC-2 model when sufficient highway widening design was available. In the EIR, the County presented what could be known now about the potential physical character of needed bank protection, recognizing the information that could practically be made available.

4. **Court's Conclusion.** The court found that the EIR made a good faith attempt to disclose what could be known about both the significance of the floodplain impact and the mitigation. The lesson is to always conduct the analysis and define the mitigation to the point that is feasible and practical during project review. CEQA does not require "project proponents to act imprudently or to bear unnecessary investigative and assessment burdens." Importantly, the court felt that the HEC-2 modeling was needed to influence the detailed design of the mitigation, not whether the mitigation was needed at all or whether it was feasible. The decision said: "The HEC-2 modeling would be of considerable assistance in designing the precise contours of the realignment and the extent of mitigation." The Court also agreed that "the HEC-2 analysis was unavailable because it was impractical to perform until Caltrans completed (the widening design)." Because the EIR had provided sufficient information for the County to make an informed decision about the highway widening's floodplain impact and the bank protection mitigation and had defined the mitigation to the extent it feasibly could, the document was adequate regarding this point raised by Riverwatch.

DEFEND THE BAY V. CITY OF IRVINE (2004)
119 Cal. Appellate 4th 1261

1. **Project.** The project involved the City of Irvine's plan for its Northern Sphere, a 7,743-acre area northeast of the former El Toro Marine Corps Air Station. The plan included a General Plan amendment and zone change for a multiple-use, planned community with both residential and job-forming development. When built out, the area was proposed to support 17,667 jobs and 12,350 housing units.
2. **CEQA Documentation.** City of Irvine prepared a program EIR for the proposed plan. The EIR identified significant impacts to the least Bell's vireo and foothill Mariposa lily, two special-status species covered in the Natural Communities Conservation Plan and Habitat Conservation Plan adopted by the City. Also, potentially significant impacts were identified to the western spadefoot toad, a sensitive species not covered in the NCCP/HCP. The NCCP/HCP was approved by the U. S. Fish and Wildlife Service (USFWS) and California Department of Fish and Game (DFG). The EIR provided mitigation for the impacts to these three species that involved future surveys and consultation to determine specific actions. In the case of

the vireo and lily, the measures were intended to be consistent with the NCCP/HCP. Project opponents claimed this was improper deferral of mitigation measures and that the mitigation was, therefore, inadequate.

3. **Analysis.** The proposed mitigation for the least Bell's vireo required that, prior to approval of the tentative tract map, the landowner must: consult with USFWS and DFG, conduct breeding season surveys to determine presence or absence, obtain a determination of the long-term habitat value of affected areas, obtain a permit from the two agencies, and implement seven specific avoidance measures, in coordination with the USFWS and DFG. The mitigation for the lily required the City to include project designs to minimize the loss of plants; conduct an evaluation of salvage, restoration, enhancement or other measures to offset impacts; monitor the plants consistent with the NCCP/HCP; and coordinate with DFG and USFWS, as well as gain USFWS's approval. These measures would be carried out consistent with the requirements of the adopted NCCP/HCP and its conservation goals and criteria.

The court disagreed with the petitioner and found the EIR mitigation to be adequate, because the City committed to mitigation and specified criteria to be met. The court recognized that, as a practical matter, it was not feasible to definitively describe the biological mitigation at the general plan amendment stage of the project. Also, the court noted that the City was required to implement mitigation through the adopted NCCP/HCP, which provided the safety of a subsequent regulatory process.

For the western spadefoot toad, the EIR provided mitigation that included conducting a follow-up survey of affected habitat to determine presence of the amphibian, and if present, constructing breeding pools in a nearby protected habitat area. An assessment of potential habitat had been conducted for the EIR to determine the significant impact. These measures were consistent with recommendations made by DFG and USFWS in comments on the EIR.

4. **Court's Conclusion.** The court found that the EIR was adequate and did not improperly defer mitigation. The City of Irvine disclosed the significant impacts to the special-status and sensitive species and made commitments to implement mitigation measures intended to achieve certain criteria in the NCCP/HCP or in response to suggestions by the relevant resources agencies. The ability to rely on the process and enforcement structure of the approved NCCP/HCP was important for the two covered species, the vireo and lily. The acceptance of the input of DFG and USFWS on the mitigation for the toad was important, as well. This is an example of where it is proper to rely on deferral to a future regulatory mechanism where there is reasonable expectation that, based on evidence in the EIR, this will lead to mitigation of the impact. The EIR also made efforts to describe in some detail the types of actions that could occur as a result of the future consultation and mitigation planning.

ENDANGERED HABITATS LEAGUE V. COUNTY OF ORANGE (2005) 32 Cal.Rptr.3d 177

1. **Project.** The project, known as "Saddle Creek/Saddle Crest," involved a 162-lot subdivision

proposed for two adjacent sites in the Santa Ana Mountains, located near the intersection of Santiago Canyon Road and Live Oak Canyon Road. The Orange County Board of Supervisors approved a Specific Plan amendment and a zone change for the project and certified the EIR in 2003. The approvals and CEQA documentation were challenged by a consortium of environmental groups (Endangered Habitat League et. al.) on the grounds that the project was inconsistent with the General Plan and that the EIR failed to provide sufficient information to make an informed decision on the project. The case was appealed by the plaintiffs to the Fourth District Court of Appeal after the trial court ruled in favor of Orange County and the developer, Rutter Development.

2. **CEQA Documentation.** The County of Orange prepared an EIR for the proposed project. The Endangered Habitats League challenged the document on the grounds that it improperly deferred mitigation, among other causes of action (i.e., used a traffic conditions threshold that is inconsistent with the standard in the General Plan, failed to consider a significant increase in traffic on Santiago Road). The league contended that the EIR improperly deferred analysis and mitigation of eleven project impacts in the areas of construction noise, dirt hauling, drainage, fuel modification, gnatcatcher habitat, replanting of trees, tree restoration, and water quality.
3. **Analysis.** The Court of Appeals evaluated Endangered Habitats' claims of deferred mitigation on the basis of the standard established in *Defend the Bay V. City of Irvine*. It found that only one of the eleven claims of deferred mitigation was valid: a mitigation measure for noise impacts that, in the court's words, "does no more than require a report be prepared and followed, or allow approval by a county department without setting standards." As the court described it, the mitigation measure required that before a grading permit was to be issued, the developer must submit an acoustical analysis describing "the exterior noise environment" and "preliminary mitigation measures, if required." Before a building permit may be issued, another acoustical report must be submitted to demonstrate structures have been designed to meet "exterior and interior noise standards" satisfactory to the manager of the county's building permit division. The county building permit manager must also be satisfied the developer will place supply stockpiles and vehicles staging areas "as far [away] as practicable." The court considered this mitigation measure inadequate, because it set out no performance criteria or alternative approaches to achieve the criteria.

The court considered the other mitigation measures challenged by Endangered Habitats adequate "since they commit to mitigation and set out standards for a plan to follow." For example, a mitigation measure designed to limit traffic disruption during dirt hauling requires a restriction on the number of daily trips, a limitation on trips during peak hours, clearly marked no passing zones, and the use of "flaggers" at site entrances. For a mitigation measure on fuel modification, the court considered a reference to Orange County Fire Authority guidance for such plans to be adequate as a performance criterion.

The court also considered several biological resources mitigation measures and rejected Endangered Habitats League's assertion that they unacceptably deferred the definition of mitigation. For example, the court considered the approach to mitigation of gnatcatcher habitat loss during construction adequate because it required either on-site or off-site preservation at a ratio of at least 2:1 or compliance with habitat loss permits from relevant

agencies. The court found adequate the standards for a tree restoration, maintenance, and monitoring plan that included a commitment for the plan to “detail” long-term maintenance and monitoring, requirements for replanting procedures, and a 10-year contract with a certified arborist who would make reports through the year and be given decision-making power over tree care and maintenance.

4. **Court’s Conclusion.** The court rejected the one mitigation measure, because it referred to “exterior and interior noise standards,” which must be satisfactory to the manager of the county’s building permit division, without defining those performance standards. It also did not provide alternative approaches for meeting the criteria. Although this case did not break any new ground, it reinforced the principles in *Defend the Bay v. City of Irvine*, i.e., when mitigation details are not practical to define, the courts are looking for a commitment to mitigation, a list of alternative approaches to be considered, and an articulation of specific performance criteria. It also provided a number of examples of mitigation measures that the court felt met the standard.

SAN JOAQUIN RAPTOR RESUCE CENTER V. COUNTY OF MERCED (2007) 149 Cal.App.4th 645

1. **Project.** In 2000, Jaxon Enterprises (Jaxon) applied for a Conditional Use Permit for the expansion of an existing aggregate mine, located four miles northeast of the City of Le Grand in Merced County, CA. The proposed expansion was to increase the acreage available for mining from 90 to 304 acres, thus increasing the available aggregate reserves from 2.5 million tons to 7.8 million tons and increasing the productive life of the mine.
2. **CEQA Documentation.** After preparing an initial study, County planning staff determined that it would be necessary to prepare an EIR. The Notice of Preparation was issued and a Draft EIR was release for public review and comment in April 2004. In November, 2004, the County Planning Commission approved the project and certified the EIR.

Analysis. The EIR identified potential significant impacts on vernal pools and burrowing owl habitat, and described both pre-construction mitigation measures, as well as mitigation measures to be implemented prior to conducting mining activities within a provisional 300-foot setback from the vernal pools. The mitigation measures included pre-construction protocol-level surveys within the 300-foot setback, and if species were present, then development and implementation of a management plan prior to activities being conducted within the setback. The management plan would also require concurrence from Department of Fish and Game and U. S. Fish and Wildlife Service.

The mitigation measures stated, as a general goal, that the plan must “maintain the integrity and mosaic of the vernal pool habitat.” However, other than listing management techniques, such as periodic mowing, rotational grazing, etc., it did not describe what the plan would contain or explain how it would lead to the stated goal. The petitioners, the San Joaquin Raptor Rescue Center, Protect Our Water, and Le Grand Community Association, argued that because the mitigation measures allowed for future formulation of land management aspects of the mitigation measures, the EIR impermissibly deferred the development of important mitigation measures until after project approval.

3. **Court's Conclusion.** The court agreed with the petitioners on the issue of deferral of formulation of the land management plan, noting that although the mitigation measure contained a generalized goal of maintaining the integrity of vernal pool habitats, no specific criteria or standard of performance were provided in the EIR. Stated differently, the generalized goal was not sufficient to meet the requirement of a specific performance criterion. The court noted that there are circumstances in which some aspects of mitigation may be deferred. In this case, however, the court found “no reason or basis” for explaining why it was not practical to define mitigation in the EIR and that deferral to a future management plan was necessary. The court found the same problem with the land management plan with regard to protecting the burrowing owl, stating, “No reason is given for deferral...nor are any criteria or standards of performance set forth.”

GENERAL PRINCIPLES FROM THE CASES

Each project situation needs to be evaluated based on its own facts. The court decisions have addressed some common principles about when it is appropriate to defer the detailed definition of mitigation measures. These principles will help you decide how to treat the issue of deferring mitigation measures. They are listed below.

1. Deferring the environmental assessment of a significant impact conflicts with CEQA. It must be in the EIR or MND.
2. Deferring the adoption of mitigation until a future study identifies the mitigation is also not allowed. The study must be done as part of the EIR or MND.
3. Deferring significant formulation of significant aspects of a mitigation measure may be found inadequate.
4. If mitigation details cannot be defined in the EIR, it is important to explain why it is impractical to do so.
5. If deferring the detailed description of a mitigation measure, performance criteria need to be as specific as possible, not just presented as generalized goals.
6. It is adequate to recognize a significant effect, adopt a measure that commits the lead agency to mitigate, and describe the specific performance criteria for mitigation, if the plans, design details, or precise means to mitigate are not practical to define at the time of project approval. Demonstrating in the record that a detailed description of mitigation is impractical at the time of the CEQA document is critical. The commitment to mitigate should be accompanied by a list of potential approaches to achieve the avoidance or lessening of the significant effect to demonstrate that the eventually selected measures are reasonably expected to be feasible and effective.
7. It can also be adequate to require compliance with environmental regulations as mitigation when there is reasonable expectation based on meaningful information

that compliance will result in the effect being mitigated. Examples accepted in past court cases include the Section 404 wetland fill permit and the mitigation process in an adopted HCP/NCCP.

8. CEQA does not ask an applicant to go through the time and expense of preparing engineering plans, facility designs, and detailed management or operational plans that implement mitigation measures prior to approval of the project. Examples of items the court has found acceptable to submit after project approval as mitigation are: transportation management plans, parking supply plans with specific locations, grading plans, plans for protection from downstream damage by drainage changes, drainage improvement plans, HEC-2 modeling to support precise design of bank protection, and a final map. The submittal of such implementing plans and components must be tracked by the mitigation monitoring program, if the EIR identifies them as mitigation for significant effects.
9. If an impact to natural resources has been identified, and the mitigation measure calls for a management or restoration plan to be developed, the mitigation measure must also describe the specific biological performance criteria to be achieved and identify alternative options for actions in the plan that will achieve the criteria of the mitigation measure. The EIR should also provide an explanation of why it is impractical or infeasible to provide the necessary details in the EIR.